LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 31 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

No. 272

272

ARTHUR TERMINIELLO,
Appellant,

vs.

CITY OF CHICAGO,
Appellee.

CERTIORARI TO SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. MCCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

PETITION FOR REHEARING.

BENJAMIN S. ADAMOWSKI,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Appellee.

JOSEPH F. GROSSMAN,
First Assistant Corporation Counsel,
L. LOUIS KARTON,
Head of Appeals and Review Division,
A. A. PANTELIS,
HARRY A. ISEBERG,
Assistant Corporation Counsel,
Of Counsel.

INDEX.

PAGE

SUMMARY OF ARGUMENT:

I. The decision of the court violates its own rules and is contrary to a long line of its own decisions 2

(a) Rule 38 of this court limits review to questions specifically presented by the petition for writ of certiorari 2

(b) Errors not assigned and relied upon should not be considered because neither party has had an opportunity to brief or argue such points in this court 3

(c) Assignments of error appearing in the record but not mentioned in the argument will not be considered by this court 4

(d) The decision of this court is based on an instruction given to the jury which was not objected to by the defendant; was not asserted as error in any motion for new trial in the trial court; was never asserted in the Illinois Courts of Review as a basis for reversal; was not asserted in the petition for certiorari in this court and has been explicitly disavowed at the bar of this court by petitioner's counsel 4

(e) Orderly procedure requires that the parties shall have an opportunity to brief and argue points asserted as error 5

(f) Sudden change in the procedural requirements without notice to the parties is in violation of elementary rules of jurisprudence. 5

(g) An objection to the charge of a trial judge must be specifically made in order to give him an opportunity to correct errors and omissions before they are made the basis for an assignment of error and review 6

(h) The practice in Illinois and the rules of the Municipal Court of Chicago require that objections to an allegedly erroneous instruction must be specifically called to the attention of the trial court or the error is not available on review 6

(i) Elementary justice requires the court to give the parties a full opportunity to brief and argue the unasserted error or the parties are deprived of a fair day in court 7

(j) The case was accepted for review on the basis of errors assigned in the petition for certiorari but the opinion of the court is on a point not therein asserted 8

II. Had the appellee been aware of the asserted error or of the court's intention to base its decision thereon, it would have argued the point in its brief and oral argument 8-9

(a) Appellee would have pointed out that the portion of the instruction criticized by this court should have been disregarded as harmless error because it is clearly inapplicable to the undisputed evidence which shows that the petitioner created a disturbance of the peace by the use of the epithets "scum" and "slimy scum" to members of his audience.. 9

(b) As applied to the specific facts in this record, the criticized portion of the instruction was irrelevant and the judgment should stand on the basis of the applicable portion of the instruction to the undisputed facts 9

(c) An inaccuracy in an instruction is not ground for reversal if, as applied to the evidence then before the jury, the inaccuracy could not have worked injury to the defendant ... 10

(d) Only one who is harmed or affected by an unconstitutional construction of an ordinance can complain. The admitted use of classical fighting words by the appellant takes him outside of the constitutional guarantee of free speech and he has not been injured by the criticized instruction nor is the ordinance as to him unconstitutional 11

(e) An erroneous instruction, even when objected to in apt time and properly made the basis of an assignment of error on appeal, does not warrant a reversal without a remandment 12

(f) The appellee's motion for a directed verdict finding the appellant guilty at the close of all the evidence should have been sustained on the undisputed evidence that Terminiello was guilty of a breach of the peace by addressing epithets to members of the audience which have been held to have the force of blows and invite retaliation. Where a verdict of guilty could and should have been directed, an error in the giving of an instruction does not furnish a ground for reversal 12-13

(g) The failure of the appellant to set forth in the transcript of the record all of the instructions given precludes him from basing an assignment of error on any one instruction.. 13

III. The undisputed facts in the record show clearly that appellant's words and conduct produced a clear and present danger to the public peace.... 14

(a) In view of the admitted facts in this record, it cannot be denied that Terminiello was guilty of a breach of the peace which the public authorities have a right to punish. Inasmuch as the municipality is made liable by statute for damages to persons or property resulting from mob violence, it should not be prevented from taking appropriate action against the instigator of the disturbance 14-15

Conclusion 15

Under the decision of this court in Chaplinsky v. New Hampshire, the appellant is guilty of a breach of the peace and none of his constitutional rights are violated by punishing him 15-16

Authorities Cited.

Chaplinsky v. New Hampshire, 315 U. S. 568 ..... 9, 15
Chicago City Railway Co. v. Cooney, 196 Ill. 466, 472 10
City of Chicago v. Knobel, 232 Ill. 112 12
City of Chicago v. Williams, 254 Ill. 360 12
Dickinson Industrial Site Inc. v. Cowan, 309 U. S. 382, 389, 84 L. ed. 819, 825 4
Fleurnoy v. Wiener, 321 U. S. 253, 88 L. ed. 708 ..... 2, 3
General Talking Pictures Corp. v. Western Electric Co., Inc., 304 U. S. 175, 179, 82 L. ed. 1273, 1275 4
Guerini v. Carlin, 248 U. S. 334, 338 6
Gunning v. Cooley, 281 U. S. 90, 98, 74 L. ed. 720, 726 4
Helvering, 293 U. S. 172, 182, 79 L. ed. 264, 270 4
Howe Machine Co. v. Ballwegg, 89 Ill. 318, 320 13
Hutchins v. King, 1 Wallace 53, 17 L. ed. 544 2
Madison v. Wedron Silica Company, 352 Ill. 60, 62 13
McDermott v. Severe, 202 U. S. 600, 610 6
National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 357, 84 L. ed. 799, 807 4
Palmer v. Hoffman, 318 U. S. 109, 119 6
Penna. R. R. Co. v. Minds, 250 U. S. 368, 375 6
Roberts, et al. v. Emmerson, 271 U. S. 50, 54-55 11
Southeastern Express Company v. Miller, 264 U. S. 541, 542, 68 L. ed. 840, 841 4
Stromberg v. California, 283 U. S. 359 ..... 8, 12
Swisher v. Deering, 204 Ill. 203 9
Trailmobile Co. v. Whirls, 331 U. S. 40, 48, 91 L. ed. 1328, 1335 4
Voeller v. Nielston Warehouse Co., 311 U. S. 531 11
Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 182, 79 L. ed. 264, 270 4

Rules Cited.

Rule 38 of the United States Supreme Court 2
Rule 62 of the Municipal Court of Chicago 6

Statute Cited.

1947 Ill. Rev. Stat. Ch. 38, pars. 521-524 14

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

No. 272

ARTHUR TERMINIELLO,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

CERTIORARI TO SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. McCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

PETITION FOR REHEARING.

Now Comes City of Chicago, a municipal corporation, appellee herein, by Benjamin S. Adamowski, Corporation Counsel of the City of Chicago, its attorney, and respectfully prays that the Court grant a rehearing herein and in support of said petition for rehearing submits the following:

I.

This Court has rendered a decision in a manner which violates its own rules and is contrary to a long line of its own decisions.

The disturbance created by the appellant Terminiello was a mere trifle compared to the blow which this court has given to the orderly processes of judicial review by the decision of the majority of the court. The court has ignored its own rules and has acted directly contrary to a long line of its own decisions and has thereby avoided a decision of this case on the basis of the issues urged as error and argued before this court.

The second paragraph of Rule 38 of this court, dealing with review on writ of certiorari contains the following statement:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

This rule has governed reviews by this court during the many years of its existence. In *Hutchins* v. *King*, 4 Wallace 53, 60; 17 L. ed. 544 this Court said:

> "Some other positions were pressed by the plaintiffs in error upon the attention of the court on the argument, but we do not notice them; because what is termed in the transcript 'a bill of exceptions' does not show that any exception was taken to the rulings of the court. * * * To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon."

In *Flournoy* v. *Wiener*, 321 U. S. 253, 88 L. ed. 708, this court (p. 259) said:

> "Rule 9 of this Court's Rules requires the appel

lant in all cases to file assignments of error 'which shall set out separately and particularly each error asserted,' and paragraph 9 of Rule 13, requiring the statement of points to be relied upon, provides that 'The Court will consider nothing but the points of law so stated.' See also Rule 27, par. 6. It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon even though properly presented to and passed upon by the state court. *O'Neil* v. *Vermont*, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646, 651, 69 L. ed. 1135, 1137, 45 S. Ct. 618; *Herbring* v. *Lee*, 280 U. S. 111, 117, 74 L. ed. 217, 221, 50 S. Ct. 49, 64 ALR 1430; *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86, 91, 77 L. ed. 180, 184, 53 S. Ct. 32, 86 ALR 174; *Southern P. Co.* v. *Gallagher*, 306 U. S. 167, 172, 83 L. ed. 586, 590, 59 S. Ct. 389; *Jones* v. *Opelika*, 316 U. S. 584, 592, 86 L. ed. 1691, 1698, 62 S. Ct. 1231, 141 ALR 514. The rule is the same in the case of applications for certiorari. Rule 28, p. 2; *General Talking Pictures Corp.* v. *Western Electric Co.* 304 U. S. 175, 179, 82 L. ed. 1273, 1275, 58 S. Ct. 849; *National Licorice Co.* v. *National Labor Relations Bd.*, 309 U. S. 350, 357, 84 L. ed. 799, 807, 60 S. Ct. 569."

and again at page 261 this court said:

"But this question is not before us because appellant, by his statement of points to be relied on, has affirmatively excluded it from consideration on this appeal and has limited himself to the different question arising under the Fifth Amendment. *In any case we ought not to consider it here because in reliance upon this declaration neither party has briefed or argued it in this Court. Rule 27, par. 6 declares that errors not urged in the briefs will be disregarded. And, independently of 'technical' rules it is not the habit of this Court to decide important constitutional questions which the parties have not presented, briefed or argued.*" (Italics supplied.)

In addition to the cases cited in the *Flournoy* case, other decisions by this court expressly adhering to the rule that

this court will not consider errors which are not assigned in the petition for certiorari include *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48, 91 L. ed. 1328, 1335; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 357, (footnote), 84 L. ed. 799, 807; *Dickinson Industrial Site Inc.* v. *Cowan*, 309 U. S. 382, 389, 84 L. ed. 819, 825; *General Talking Pictures Corp.* v. *Western Electric Co. Inc.*, 304 U. S. 175, 179, 82 L. ed. 1273, 1275; *Gunning* v. *Cooley*, 281 U. S. 90, 98, 74 L. ed. 720, 726; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182, 79 L. ed. 264, 270; *Helvering* v. *Taylor*, 293 U. S. 507, 511, 79 L. ed. 623, 627.

This court has also held that on review it will not consider assignments of error appearing in the record but not mentioned in the argument, *Southeastern Express Company* v. *Miller*, 264 U. S. 541, 542, 68 L. ed. 840, 841.

Many more cases are available in support of this rule but we deem it unnecessary to cite them. It is sufficiently established by the foregoing citations that this court has repeatedly announced that its review is restricted to the errors alleged in the petition for certiorari and that it will not consider points not there asserted nor will it consider points which are asserted but are not argued. Despite this well established limitation on the court's procedure on review, this court has completely ignored the rule and has decided the instant case on an instruction given to the jury which was not objected to by the defendant, was not set forth in any motion for new trial in the trial court, was nowhere asserted in the review courts of Illinois as a basis for reversal; it was not alleged in the petition for certiorari in this court as an error justifying review and, as Mr. Justice Frankfurter aptly pointed out in his dissenting opinion, it was explicitly disavowed at the bar of this court by petitioner's counsel.

It hardly seems necessary to argue the necessity for this well established rule of procedure. This court has so

frequently had occasion to consider the rule and the reasons therefor in so many of its decisions that we are at a loss concerning what we could possibly urge upon this court that it has not already heretofore considered in the many cases referred to. The whole theory of American and English jurisprudence, in so far as it applies to appellate review, is that a review is confined to errors assigned. The decision in this case is basically erroneous because as this court so aptly pointed out in *Flournoy* v. *Wiener*, 321 U. S. 253, 261, from which we have hereinabove quoted, it disposes of the case on a point which neither party has briefed or argued in this or any other court. The decision constitutes a complete negation of orderly procedure for review. In the light of this decision, no member of the bar of this court can ever know what he might anticipate in the way of argument or decision if this court is free to decide a case upon a point which is neither asserted nor argued. The decision seems all the more incomprehensible in view of the express disclaimer by the appellant of any intention to rely upon the point upon which this court based its decision.

We can appreciate that the law is constantly changing but it is inconceivable that the rules relating to procedure should be changed in the highest court of the land without any advance notice to the participants in the litigation. In every field, professional, business or sports, it has always been considered elementary that the game is played according to well recognized rules. Changing the rules without notice to the participants can never be condoned and certainly should never be done by the highest court of the land. The reports are full of cases where the courts of review have condemned lower courts for departing from well recognized rules of procedure, yet in this case we have the highest court, from which there is no appeal.

guilty of the very practice which has so frequently been condemned.

The court has also repeatedly and expressly held that an objection to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis for an assignment of error on review, and that this is the only course fair to the court and the parties. *McDermott* v. *Severe*, 202 U. S. 600, 610; *Guerini* v. *Carlin*, 248 U. S. 334, 338; *Penna. RR. Co.* v. *Minds*, 250 U. S. 368, 375; *Palmer* v. *Hoffman*, 318 U. S. 109, 119.

The practice in Illinois also requires that objection be taken to an erroneous instruction and that the erroneous instruction be specifically called to the attention of the trial court in the motion for a new trial. Failure so to do requires the court of review to refuse to consider any error relating to the instruction. The action of this court is doubly erroneous in that it violates its own practice as well as that established in Illinois.

Rule 62 of the Municipal Court of Chicago relating to instructing the jury provides as follows:

> "(3) Objections to the charge must be made before the jury retire and out of the presence of the jury. They must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made, and upon the objections being made the judge may make such corrections as he may deem proper."

In view of the failure of appellant to comply with the requirements of the practice in the Municipal Court of Chicago, of the State of Illinois, and of this Court, we submit that this Court should not reverse the judgment on the basis of the criticized instruction.

The plainest consideration of justice demands that there be a rehearing in this case if for no other reason other

than that the plaintiffs in the case were given no opportunity to argue the point which has been made the sole ground of decision. Even assuming that a court has a right or even in fairness should unearth a point that neither of the parties has suggested, elementary justice requires that the Court give the parties a full opportunity to argue it. Here not only was the point nowhere raised in the long judicial proceedings through four courts, but when first suggested by a member of this court during the oral argument the appellant, in open court, disavowed any claim for relief from this court on that ground.

To allow the decision to stand under these circumstances not only deprives the plaintiff in this case of a fair day in court but establishes a precedent of such magnitude and force as to amount to a tying of the hands of law enforcing agencies throughout the country without the question having ever been properly argued before this tribunal, and this in view of the significant fact that four out of the nine members of this Court disagreed with the logic and soundness of the decision. If, after a full opportunity to argue this question, the Court should reach the same conclusion, we may not be satisfied with it but we shall at least know that we have enjoyed a privilege basic to our democracy, namely, a full and complete hearing.

If we had even remotely suspected the possibility of this result we would have called the Court's attention to the entire record and to all the instructions, which, although not in the abstract, appear in the record, with a view toward convincing the Court that when read as a series of instructions the condemned portion was cured. We point to this simply by way of illustration, for there are other points we might have argued had we remotely suspected the Court's advocacy of the point.

We respectfully ask the Court to reopen this case for further argument so that the officers of every municipality in the land may be assured that in these vital matters affecting their authority and power to maintain peace and order in their community they have not been made impotent without a fair day and an opportunity to be heard by this tribunal.

In the majority opinion the statement appears: "The case is here on a petition for certiorari which we granted because of the importance of the question presented." It is ironical that the importance of the question presented by the petition for certiorari was considered by the majority of the court distinct and apart from the facts of the case, for it seems clear that the court was less concerned with the facts presented by the petition for certiorari than it was with an instruction hidden away in the record.

The dissenting opinions of Mr. Chief Justice Vinson and Mr. Justice Frankfurter point out the inapplicability of *Stromberg* v. *California*, 283 U. S. 359, to the instant situation. Certainly their vigorous analysis shows the clear distinction between the cases. There it appears that the constitutional question was squarely raised and passed upon. Here the instruction has never been presented for consideration.

II.

The theory of the majority of the court deprives the appellee of an opportunity to argue the question of the instruction which forms the basis for the court's decision.

The majority opinion does not decide the case on the basis of any point asserted or argued in the briefs of either party. Had the appellee been made aware by any assertion of the appellant that the instuction given to the jury would

have been assigned as error, or had we known that this court intended to make the instruction the basis of its decision, we would have argued the point and shown reasons to the court why this instruction does not vitiate the judgment against appellant. Had we had the opportunity, we would have pointed out:

1. The criticized portion of the instruction can be disregarded as harmless error because it is clearly inapplicable to the undisputed facts in this case.

The instruction charged, as follows:

> "The misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm" (Tr. 129).

This instruction is not to be construed in a vacuum but is to be construed as it applied to the facts in this case. The record shows that Terminiello addressed to members of the audience the epithets "scum" and "slimy scum". There is no dispute on this point. In so far as the instruction refers to stirring the public to anger, inviting dispute and bringing about a condition of unrest, under well settled rules of practice, this portion of the instruction can be disregarded as surplusage or harmless error in that it has no application to the specific "fighting words" used by him. In *Swisher* v. *Deering*, 204 Ill. 203, the court (p. 207) points out that where proof of guilt is so clear that on the facts the jury could not have found otherwise, the "court will not reverse a case for error in an instruction. * * *" In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, the jury was instructed as follows:

> "The legislature of our state has seen fit to affix a penalty to the act of addressing any offensive, derisive

> or annoying words to any other person who is lawfully in any street or other public place."

The ordinance of the City of Chicago under which appellant was charged states simply "all persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of peace, or diversion tending to breach of the peace, * * * shall be deemed guilty of disorderly conduct, * * *".

Under this ordinance the portion of the instruction which charges:

> "The misbehavior may constitute a breach of the peace if it * * * creates a disturbance * * *."

applies specifically to the undisputed facts in evidence that the appellant addressed the epithets "scum" and "slimy scum" to members of the audience. Under the *Chaplinsky* decision there can be no criticism of this portion of the instruction as it applies to these precise statements.

Under the circumstances, had the appellant objected to the instruction in the trial court, the trial court would have had an opportunity to delete from the instruction the portion which has no reference to the facts in evidence. This he could have done under the well settled rules of practice to which we have heretofore referred, but regardless, there can be no dispute that the instruction, with the irrelevant portion deleted, meets the test of constitutionality established by this court in the *Chaplinsky* case. An inaccuracy in an instruction is not ground for a reversal, if, as applied to the evidence then before the jury, such inaccuracy could not have worked injury to the defendant. *Chicago City Railway Co.* v. *Cooney*, 196 Ill. 466, 472.

2. No complaint can be made that an instruction is unconstitutional unless, on the facts in the case, the ordinance as so construed is both unconstitutional and affects the one complaining.

It is a well settled rule of law that one who is not affected by the unconstitutional portions of an ordinance or statute cannot complain of its unconstitutionality. Only one who is harmed or affected by an unconstitutional construction of an ordinance can complain. *Roberts, et al. v. Emmerson*, 271 U. S. 50, 54-55. In *Voeller v. Nielston Warehouse Co.*, 311 U. S. 531, this court (p. 537) said:

> "* * * this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions."

As we have herein demonstrated, the ordinance on the facts in this case, as applied to the "fighting words" admittedly used, is valid. Nothing in the majority opinion alters this ruling established by the *Chaplinsky* and *Cantwell* cases. The irrelevant portion of the instruction forms the basis for this court's conclusion that the ordinance has been construed so as to infringe upon appellant's constitutional right of freedom of speech. Inasmuch as it clearly appears that such a construction can have no application to the epithets which he used, it follows that no unconstitutional application of the ordinance has formed the basis for this conviction. The appellant is therefore in no position to complain; in fact he has not complained, and the Court is not justified in making the complaint for him on a hypothesis not presented by the facts.

We therefore respectfully urge that, had we been given an opportunity to argue this point, we would have called this to the attention of the court and the court would doubtless,

in view of the well settled law on this point, have not arrived at the conclusion reached by the majority.

3. An erroneous instruction does not warrant a reversal without a remandment.

It is well settled that an erroneous instruction, even when objected to in apt time and made the basis of an assignment of error on appeal, does not warrant a reversal without a remandment. The practice is that the trial court must be given an opportunity to instruct the jury correctly. This court has recognized the practice in *Stromberg* v. *California*, 283 U. S. 259, where the court pointed out that the cause would have to be remanded.

4. The trial court should have granted appellee's motion to direct a verdict for plaintiff on the undisputed evidence. An erroneous instruction, under these circumstances, does not warrant reversal.

Another point which we would have urged upon the court's attention is that the City filed a motion at the close of all the evidence for a directed verdict to find Terminiello guilty (Tr. 126). The law in Illinois is well settled that a proceeding for a violation of an ordinance is not a criminal prosecution but is a civil suit and that the rules of civil procedure are applicable.

City of Chicago v. *Knobel*, 232 Ill. 112;
City of Chicago v. *Williams*, 254 Ill. 360.

In view of the undisputed facts in this record, which show that Terminiello addressed the epithets "scum" and "slimy scum" to members of the audience, and in view of the holding of this court in *Chaplinsky* v. *New Hampshire*, and in view of the cases which hold that such epithets have the force of blows and invite retaliation and therefore con-

stitute a breach of the peace when used, it would have been appropriate for the trial court to direct a verdict of guilty. Had the trial court done so, it would have been unnecessary in any event to have instructed the jury and the offending instruction would never have been in the case. Certainly there would have been no necessity for this or any other instruction had the trial court granted the City's motion for a directed verdict at the close of all the evidence. Since a verdict might properly have been directed against the defendant, and a contrary verdict would have, on the undisputed facts, been unwarranted, errors in instructions will not furnish a ground for reversal.

Howe Machine Co. v. *Ballwegg*, 89 Ill. 318, 320;
Swisher v. *Deering*, 204 Ill. 203, 207.

It should also be noted that by his admission that he used these "fighting" words, appellant has practically pleaded guilty.

5. Under the Illinois practice, the failure of Appellant to set out all of the instructions given precludes him from asserting error on any one instruction.

We would also point out that the appellant is precluded from complaining of the instruction because of his failure to comply with the requirements of the Illinois law which make it mandatory for an appellant to set forth *all* of the instructions for the plaintiff and the defendant in order to obtain a review based on an instruction. *Madison* v. *Wedron Silica Company*, 352 Ill. 60, 62;

A comparison of the instructions contained in the transcript, at pages 128-129, with the record will readily disclose the omission. His failure to present all of the instructions given to the jury violates the Illinois practice and this court, being bound by the law of the State of Illinois as to such matters, could not properly consider an objection to an instruction even had objection been seasonably made.

III.

The court has overlooked the facts in this record which show clearly that appellant produced a clear and present danger to the public peace.

The opinion points out that freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. Of what use is it for the court to state constitutional guarantees as abstractions yet fail to apply these theories to factual situations when they appear in this court.

Here is presented a precise factual situation which has already been before three courts in Illinois. The evidence shows the use of classical fighting words "scum" and "slimy scum" addressed to members of the audience in the hall where Terminiello made his speech.

Inside the hall the audience were moved to howls, cries and shouts to "kill the Jews", "kill Morgenthau", "get rid of Jews, niggers and Catholics", "cripple them", "sterilize them." Is this what the court considers to be merely "public inconvenience, annoyance or unrest"?

This was a howling mob being incited not to a mere disturbance of the peace, but to murder and violence.

Consider further, Terminiello's incitement:

"We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us."

Must the authorities wait until a rabble-rouser cries "Come on, let's kill them" and actually leads the rioters

to the assault, before they can arrest him. But then the damage is done.

Illinois, like most states, has statutes which make municipalities liable for damages to persons or property resulting from mob violence (1947 Ill. Rev. Stat. Ch. 38, pars. 512-524). Yet this court's decision prevents the city from taking action before the damage is done by arresting the rabble-rouser. It would be an ironic state of affairs when the city cannot punish for breach of the peace but must respond in damages for the results of the peace-breaker's depredations.

Conclusion.

In *Chaplinsky* v. *New Hampshire*, this court held that a person could constitutionally be punished for the utterance of "fighting words" and that such "fighting words" constituted a breach of the peace. It is admitted that the defendant uttered "fighting words" namely "scum" and "slimy scum" and addressed them to his audience. He thereby clearly breached the peace. He thereby clearly violated the ordinance prohibiting a breach of the peace. *Chaplinsky* v. *New Hampshire* clearly establishes that constitutionally the city had a right to punish the defendant for so breaching the peace. Yet this court has held that the defendant's right of free speech has been impaired. Why? As we read the opinion, apparently because the instruction gave an interpretation to the ordinance which would permit prosecution of some hypothetical person who might utter words not constituting "fighting words". Assuredly this cannot affect the right of the public to punish defendant for an admitted breach of the peace according to a precise construction of the ordinance as narrow as that heretofore sustained by *Chaplinsky* v. *New Hamp-*

shire. We confess that we cannot understand from the court's decision what constitutional right enjoyed by defendant compels the reversal of a conviction for words and conduct for which the constitution admittedly grants no immunity.

We respectfully submit that this court should reconsider its decision and grant a rehearing on the basis of what is hereinbefore set forth and upon rehearing should either hold that the basis of the opinion is erroneous in that it is predicated on an alleged error not properly before this court, or reconsider its decision in the light of the arguments herein contained and affirm the judgment of the courts of Illinois, or, at the very least, remand the cause for a new trial.

Respectfully submitted,

BENJAMIN S. ADAMOWSKI,
Corporation Counsel of the
City of Chicago,
511 City Hall, Chicago 2, Illinois
Attorney for Appellee.

JOSEPH P. GROSSMAN,
First Assistant Corporation Counsel.

L. LOUIS KARTON,
Head of Appeals and Review Division,

A. A. PANTELIS,

HARRY A. ISEBERG,
Assistant Corporation Counsel,
Of Counsel.

Certificate.

I do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

L. LOUIS KARTON,
Assistant Corporation Counsel,
Head of Appeals and Review Division.